

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

NOEL CRUZ,

Defendant.

No. CR-06-2024-AAM

**ORDER RE  
PRETRIAL MOTIONS**

A pre-trial conference was conducted on July 6, 2006. Gregory M. Shogren, Esq., Assistant U.S. Attorney, appeared for the plaintiff. Richard A. Smith, Esq., appeared for the defendant. This order memorializes the court's rulings made in open court.

**Defendant's Motion For Discovery (Ct. Rec. 59)**

Defendant's motion is **DENIED** as moot with the understanding that the government will produce to defendant, prior to trial, the grand jury transcripts, and that the government will comply with its obligations under *United States v. Henthorn*, 931 F.2d 29 (9<sup>th</sup> Cir. 1991), as soon as possible.

**Defendant's Motion To Disclose 404(b) and 609 Evidence (Ct. Rec. 60)**

Defendant's motion is **DENIED** as moot based on the government's disclosure of the 404(b) and 609 evidence it intends to introduce at trial. If necessary, the court will determine at an appropriate time if the evidence should be

1 admitted for consideration by the jury.

2  
3 **Defendant's Motion To Suppress Statements (Ct. Rec. 72)**

4 Good cause appearing for the untimeliness of this motion, and defendant's  
5 counsel having clarified the nature of this motion in open court, the government  
6 shall serve and file a supplemental response no later than **July 10, 2006**, and the  
7 defendant shall serve and file a reply no later than **July 12, 2006**. The motion shall  
8 be determined on the briefing, unless the court finds the need for an evidentiary  
9 hearing which will be held before commencement of trial on July 17.

10  
11 **Defendant's Motion To Suppress Identification (Ct. Rec. 62)**

12 Defendant motion is **DENIED**. There is nothing "impermissibly  
13 suggestive" about the photo montage of the six individuals shown to Maria Elena  
14 Morales on December 17, 2005, soon after her encounter with the defendant on  
15 November 28, 2005.

16  
17 **Defendant's Motion To Dismiss Count 3 of Indictment (Ct. Rec. 64)**

18 Count 3 charges the defendant with "Aggravated Identity Theft:"

19 From on or about November 28, 2005, through and including  
20 on or about December 5, 2006, in the Eastern District of  
Washington and elsewhere, the defendant, NOEL CRUZ,  
21 . . . did knowingly possess and use, without lawful authority,  
a means of identification of another person, to wit, a Wells  
22 Fargo Bank Visa credit card bearing the name of J.S.,  
account number XXXXXXXXXXXX, during and in relation  
23 to the offense of bank fraud, Title 18, United States Code,  
Section 1344, and did aid and abet said offense.

24 All in violation of Title 18, United States Code, Sections 2 and  
25 1028A.

26 18 U.S.C. §1028A(a)(1) provides that:

27 Whoever, during and in relation to any felony violation  
enumerated in subsection (c), knowingly transfers, possesses,  
28 or uses, without lawful authority, a means of identification  
of another person shall, in addition to the punishment

1 provided for such felony, be sentenced to a term of  
2 imprisonment of 2 years.

3 Here, the “felony violation” alleged to be in relation to the identity theft is  
4 bank fraud, 18 U.S.C. §1344.

5 Defendant contends that all Count 3 alleges is that he used a stolen credit  
6 card to obtain gasoline and that pursuant to recent case law from the Ninth Circuit  
7 and the Third Circuit, this is not Aggravated Identity Theft.

8 In *United States v. Melendrez*, 389 F.3d 829 (9<sup>th</sup> Cir. 2004), the defendant  
9 pled guilty to a single-count indictment charging him with unlawfully producing  
10 more than five identification documents in violation of 18 U.S.C. §1028(a)(1),  
11 (b)(1)(A)(i) and (ii), and (b)(1)(B). The defendant appealed the enhancement of  
12 his offense level under the Sentencing Guidelines. The Ninth Circuit held his  
13 sentence was properly enhanced for his use of means of identification to produce  
14 or obtain another means of identification. *Melendrez* was cited by the Third  
15 Circuit in *United States v. Newsome*, 439 F.3d 181 (3<sup>rd</sup> Cir. 2006), where the same  
16 Sentencing Guideline enhancement provision was at issue. The Third Circuit held  
17 the creation of forged driver’s licenses and employer IDs for the purpose of  
18 making fraudulent bank withdrawals qualified for the enhancement.

19 The issue in the case at bar does not involve any sentencing enhancement  
20 provision under the Guidelines since that stage of the proceedings has yet to be  
21 arrived at. What defendant attacks is the ability of the government to charge him  
22 with violation 18 U.S.C. §1028A. **§1028A** was not at issue in *Melendrez*. Instead,  
23 **§1028** was at issue. *Newsome* also did not involve **§1028A**, but rather a conviction  
24 under **18 U.S.C. §371** for conspiracy to defraud the United States.

25 Based on the language of 18 U.S.C. §1028A, the facts alleged in the  
26 indictment are sufficient to charge defendant with Aggravated Identity Theft. It is  
27 “aggravated” because defendant is alleged to have possessed and used, without  
28 lawful authority, a means of identification, specifically a stolen bank card, in

1 relation to a separate felony, that being bank fraud. Bank fraud, 18 U.S.C. §1344,  
2 is one of the predicate felony offenses that will turn a routine identity theft into an  
3 Aggravated Identity Theft. 18 U.S.C. §1344 is found in Chapter 63 of the U.S.  
4 Criminal Code. 18 U.S.C. §1028A(c)(5) says that “[f]or the purposes of this  
5 section, the term ‘felony violation enumerated in subsection (c)’ means any offense  
6 that is a felony violation of . . . any provision contained in Chapter 63 (relating to  
7 mail, bank, and wire fraud).”

8 Defendant’s Motion To Dismiss Count 3 is **DENIED**. Of course, the  
9 government still has the burden of proving beyond a reasonable doubt that the  
10 elements of Aggravated Identity Theft are established. If it successfully does so,  
11 any issue related to enhancement under the Sentencing Guidelines can then be  
12 addressed.

13  
14 **IT IS SO ORDERED.** The District Executive shall forward copies of this  
15 order to counsel.

16 **DATED** this 7<sup>th</sup> of July, 2006.

17  
18 s/ Alan A. McDonald  
19 **ALAN A. McDONALD**  
20 Senior United States District Judge  
21  
22  
23  
24  
25  
26  
27  
28